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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1074

SOUTHERN RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a–28a) is reported at 364 F. 2d 86. The opinion of the district court (Pet. App. 1a–11a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on July 27, 1966. A petition for rehearing was denied on September 22, 1966 (Pet. App. 30a). On December 4, 1966, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including February 18, 1967. The petition was filed on February 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 1(15) and 17(9) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(15) and 17(9), and 28 U.S.C. 2321–2325, are set forth in the Appendix, *infra*, pp. 15–18.

QUESTIONS PRESENTED

1. Whether a one-judge district court exceeded its jurisdiction in holding an Interstate Commerce Commission car-service order invalid in a suit for civil penalties brought against a railroad for violation of its terms, when the railroad invoked neither the administrative nor judicial remedies prescribed for testing the order's validity.

2. If not, whether the Commission had authority to promulgate the order without notice or hearing, under the emergency provisions of Section 1(15) of the Interstate Commerce Act.

STATEMENT

As evident to even a casual observer of a passing freight train, boxcars are interchanged freely among the nation's railroads. Congress having ordained "continuous [carriage] from the place of shipment to the place of destination" without change of lading, 49 U.S.C. 7, we have, in effect, a nationwide pool of railroad boxcars. See, also, 49 U.S.C. 1(4). The construction and repair of cars remains within the managerial discretion of each railroad. Accordingly, what contribution each railroad makes to this pool of boxcars is a matter for its determination, subject only to the statutory obligation "to provide and fur-

nish transportation upon reasonable request therefor" (49 U.S.C. 1(4)). A railroad can discharge that obligation by furnishing to its shippers either cars that it owns, or cars of another railroad for the use of which it must make appropriate per diem payments ("foreign" cars).

Maintaining an overall view of the distribution and handling of cars is the Car Service Division of the Association of American Railroads, pursuant to an agreement to which most of the nation's railroads, including petitioner, have subscribed. Under its auspices the railroads promulgated car-service rules setting forth certain broad principles for the handling and distribution of cars, *Official Railway Equipment Register,* I.C.C.–R.E.R., No. 34, pp. 1140–1143, but their rules failed either to stem the decline in the numbers of railroad cars or to achieve complete carrier compliance, at the very time that the need for efficient utilization of the car fleet was becoming most pressing. *Car Service, Freight Cars,* 268 I.C.C. 687, 691.

By 1962 concern was acute that the railroads were not replenishing the supply of cars as rapidly as they were retiring them. A study made for the Senate Commerce Committee reported:

> Freight car ownership is declining. We believe it unrealistic to compare present requirements with the all-time high ownership of 2,427,026 cars in 1926. However, since 1955 ownership has declined from 1,736,866 cars to 1,723,200 in 1959, a net loss of 13,666 cars. [S. Rep. No. 445, 87th Cong., 1st Sess., p. 721.]

In its 1962 annual report, the Commission, as it had in its annual reports for the several preceding years, called attention to the declining number of railroad cars, noting, "Serviceable freight car ownership continued its downward trend (1,540,719, June 1, 1961—1,513,318, June 1, 1962) as a result of curtailed expenditures on the part of the railroads." Interstate Commerce Commission, 76th Annual Report 91 (1962). This trend resulted in serious shortages in specific areas, for the transportation of specific commodities, or with respect to specific types of rolling stock.

Early in 1962 an acute shortage developed in the supply of plain 40-foot boxcars with doors eight feet wide and wider and plain 50-foot boxcars, used primarily in the transportation of lumber. The Car Service Division (see p. 3, *supra*) responded by issuing, on March 19, 1962, Special Car Order No. 103, which, in essence, imposed, as an express requirement with respect to the cars in short supply, the general principle long embodied in the Division's car-service rules (see *Car Service, Freight Cars, supra,* 268 I.C.C. 704–705)—that foreign cars be loaded via a route in which the owning road would participate, or loaded in the direction of the home road, or delivered empty to the road from which originally received, or returned empty.

The Division's order lacked means of enforcement; numerous violations of its provisions occurred; and the acute shortage in 40-foot and 50-foot boxcars persisted. Interstate Commerce Commission, 76th Annual Report 105 (1962). Accordingly, on May 21, 1962, the Commission's Safety and Service Board

No. 1 (which handles car-service matters) held a meeting and, pursuant to the procedure of Section 1(15) of the Interstate Commerce Act, 49 U.S.C. 1(15) (App., *infra*, pp. 15–16), decided that the acute shortage of boxcars, together with the ineffectiveness of the carriers' rules and regulations dealing with the problem, had resulted in an emergency; declared such an emergency; and determined that immediate action was required in all parts of the country and that notice and public procedure were impracticable. It then issued Service Order No. 939, effective May 27, 1962, with an expiration date of December 31, 1962 (later extended when complaints of acute shortages of boxcars continued to be made to the Commission). Essentially, the order was a restatement of the carriers' Special Car Order No. 103 (Pet. App. 15a).

The problem worsened, and on February 5, 1963, the Board met, vacated Revised Order No. 939, and issued its Second Revised Service Order No. 939, which again declared that an emergency existed.[1]

[1] "It appearing, That an acute shortage of box cars, fifty-foot long or longer and box cars forty-foot long or longer with side door openings eight-foot wide or more; and it appearing, that the present carrier rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange and return of box cars of these dimensions to the railroads owning such cars are ineffective; the Commission is of the opinion that an emergency exists requiring immediate action in all parts of the country, and that notice and public procedure are impracticable and contrary to the public interest and that good cause exists for making this order effective upon less than thirty days' notice." (Pet. App. 16a–17a, n. 10.)

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This order, which is under attack in this action, became effective on February 6, 1963, with an expiration date of April 30, 1963. The substance of the order was essentially the same as the previous order (Pet. App. 16a–17a).

Petitioner was one of the railroads which were experiencing grave difficulties in satisfying shippers' requirements for 40- and 50-foot boxcars. It owned some 6300 of the former and some 4400 of the latter, but for a year or so prior to the Commission's promulgation of Service Order No. 939, it had had an average of only 33 percent of its 40-foot boxcars, and only 24 percent of its 50-foot boxcars, on-line. Petitioner accordingly had much to gain from, and strongly favored, the prompt return of its rolling stock, but it questioned whether the Commission's car-service order was sufficient to achieve this objective. Nevertheless, petitioner at no time petitioned for reconsideration or submitted other pleadings to the Commission, as under the Commission's procedures it might have, but expressed its misgivings about the car-service order exclusively in correspondence that its president exchanged with the Chairman of the Commission.[2]

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[2] On November 6, 1962, President Brosnan wrote Chairman Murphy that Service Order No. 939 had proved ineffectual for the petitioner and "should either be cancelled immediately or enforced in such way as to insure Southern the use of its equipment for loading by its shippers." Chairman Murphy replied, and on December 4, 1962, President Brosnan responded that he was "glad to see that the Commission is taking active steps to see that its order is obeyed." On July 10, 1963, President Brosnan wrote Chairman Walrath that, notwithstanding the order, "unwarranted use of our cars by other railroads continues." Chairman Walrath replied, and on July 29, 1963,

A few days after its last letter, petitioner brought an action in the United States District Court for the Middle District of Georgia (*Georgia Southern and Florida Ry. Co., et al.* v. *United States,* Civil Action No. 1939) asking that a three-judge court be convened pursuant to 28 U.S.C. 2284, 2321–2325, and that it set aside Service Order No. 939. As grounds, petitioner, among other things, alleged for the first time that the procedures of Section 1(15) of the Act had been improperly invoked in the issuance of the order and that the terms of the order were vague, indefinite and uncertain. The United States and the Commission answered. Subsequently, on June 2, 1964, with the consent of the defendants and by order of the three-judge court, petitioner withdrew its suit, the complaint being dismissed without prejudice.

In the meantime, on May 31, 1963, an action for civil penalties had been brought against petitioner for 15 violations of Service Order No. 939.[3] The trial was held in abeyance while the three-judge court review of the service order remained pending. In the penalty action, petitioner did not deny that it had violated the car-service order, but defended its conduct on the

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President Brosnan responded, "If you cannot police [the order] so as to accomplish the intended purpose of compelling the return of cars to the owners' lines, you should discontinue it." On September 7 and 30, 1963, President Brosnan further wrote Chairman Walrath of his disappointment with Service Order No. 939, concluding that "it is apparent that the Commission is unwilling to withdraw this order; consequently, as much as I dislike to do so, we must take our case elsewhere, either to the Congress or the courts or both."

[3] This was one of 23 actions brought alleging railroad violations of the car-service order.

grounds, among others, that the procedures of Section 1(15) of the Act had been improperly invoked in the issuance of the order and that the order was vague, indefinite and uncertain.

The United States moved for summary judgment, urging that it was beyond the power of the one-judge district court to hold the car-service order invalid by way of defense to a suit for civil penalties brought against a railroad for violating its terms, when the railroad had invoked neither the administrative nor the judicial remedies prescribed for such a challenge. The district court disagreed, and went on to hold that the car-service order was invalid in declaring the existence of an emergency and also that it was too vague to be enforceable.

The court of appeals reversed. It held that, under the express statutory scheme for administrative and judicial review of Commission orders in 49 U.S.C. 17(9), the district court did not have jurisdiction to entertain petitioner's collateral attack upon the validity of the Commission's car-service order, and that, quite apart from this jurisdictional barrier, the defense of a lack of emergency and vagueness in the order was without merit.

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict among circuits.[4] Further review is not warranted.

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[4] The same questions decided by the Fifth Circuit here and argued in the present petition are now pending before the Fourth Circuit in *United States* v. *Southern Railway Co.*, No. 10,769, a substantially identical case, which was argued on

1. Petitioner, in first challenging the car-service order by way of defense to a penalty action for its violation, both failed to exhaust its administrative remedies and improperly attempted to circumvent the statutory provisions for judicial review of Commission orders. On either ground, its attack on the validity of the order must fail.

a. The Interstate Commerce Act provides for rehearing, reargument or reconsideration of any decision, order or requirement of the Commission, or of a division of the Commission, an individual commissioner, or—as here—a board (49 U.S.C. 16(6), 17(6) and 17(7)); "after" exhaustion of these administrative remedies the order may be challenged judicially in a suit to enjoin, suspend, or set it aside—"but not otherwise" (49 U.S.C. 17(9)). Petitioner made no attempt, under the Commission's procedures, administratively to challenge the board's order, though it could have asked the full Commission to review it. In asking the courts to set the order aside notwithstanding its default petitioner violated a cardinal precept of administrative law—that a party seeking judicial relief from agency action must first exhaust its administrative remedies. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37; *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291.

January 12, 1967. The district court in that case (*United States* v. *Southern Railway Co.*, 250 F. Supp. 759 (D.S.C.), followed the district court decision in the present case; this was, of course, before it was reversed by the Fifth Circuit.

b. Beyond that, Section 17(9) grants power to invalidate Commission orders (save reparation or other money orders) only to three-judge district courts—not to a one-judge court in a penalty action. The procedure is in terms exclusive, and must, therefore, be followed. See *e.g., Lambert Co.* v. *Baltimore & Ohio R.R. Co.,* 258 U.S. 377; *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507; *Powell* v. *United States,* 300 U.S. 276; *Venner* v. *Mich. Cent. R.R. Co.,* 271 U.S. 127, 130; *North Dakota* v. *Chicago & N.W. Ry. Co.,* 257 U.S. 485; *Meyers* v. *Famous Realty, Inc.,* 271 F. 2d 811, 817, certiorari denied, 362 U.S. 910; *United States* v. *Railway Exp. Agency,* 101 F. Supp. 1008, 1012 (D. Del.); *Interstate Commerce Commission* v. *Consolidated Freightways,* 41 F. Supp. 651 (D. N.D.); *Village of Mantorville* v. *Chicago Great Western R. Co.,* 8 F. Supp. 791, 795–796 (D. Minn.); cf. *Whitney Bank* v. *New Orleans Bank,* 379 U.S. 411; *United States* v. *Ruzicka,* 329 U.S. 287, 292; *Yakus* v. *United States,* 321 U.S. 414; *United States* v. *Sykes,* 310 F. 2d 417 (C.A. 5); *La Verne Co-op. Citrus Ass'n* v. *United States,* 143 F. 2d 415 (C.A. 9).

Petitioner's reliance upon *United States* v. *P. Koenig Coal Co.,* 270 U.S. 512, and *United States* v. *Michigan Portland Cement Co.,* 270 U.S. 521 (Pet. 14, 16), is misplaced. Both were criminal actions (in the same district court) charging violations of Section 1 of the Elkins Act. In *Koenig* the defendant did not rely upon the alleged invalidity of the Commission's order and the Court did not pass upon any such issue. See 270 U.S. at 517. In *Michigan Port-*

land Cement, the raising of the invalidity of the Commission's order as a defense was not challenged. In neither case was the challenged order held invalid, and in any event both cases were decided prior to the passage of 49 U.S.C. 17(9) in 1940.[5]

Petitioner also errs in relying upon *Flemming* v. *Nestor,* 363 U.S. 603; *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144; and *Garment Workers* v. *Donnelly Co.,* 304 U.S. 243. Those decisions involved the construction of 28 U.S.C. 2282 rather than Sections 2321–2325, and, as the court below pointed out (Pet. App. 21a), did not arise in the context of a statutory scheme for administrative and judicial review of a regulatory agency's order.

2. While, for the foregoing reasons, we believe that the validity of the car-service order may not be challenged in this proceeding, we also believe that the court of appeals correctly held the order valid.

Petitioner takes the position that because the decline in the supply of cars was a continuing problem,[6]

[5] Four district court cases cited by petitioner on page 15 of the petition are no more in point, since none was concerned with an attack upon the validity of a Commission order as a defense in a penalty suit, and in none did the court attempt to hold a Commission order invalid. As to *United States* v. *Thompson,* 58 F. Supp. 213 (E.D. Mo.), it does not appear that either party raised, or the court considered, the question whether the order could properly be attacked collaterally; nor does it appear that the decision has been followed by any court in the more than twenty years since it was rendered. The *Thompson* rationale was specifically rejected by a three-judge court in *Burton* v. *United States,* 7 Fed. Car. Cases ¶ 80,565 (W.D. Va.), affirmed *per curiam,* 338 U.S. 946.

[6] The long-range car supply problems are receiving the attention of the Commission in the proceedings in *Ex Parte* No. 241,

an acute shortage of specified types of boxcars affecting all parts of the country, as dealt with in Service Order No. 939, could not constitute an "emergency" warranting the use of the Commission's special powers under Section 1(15). The statute affords no support to so restrictive a reading. *Daugherty Lumber Co.* v. *United States,* 141 F. Supp. 576, 580–581 (D. Ore.); H. Rep. No. 18, 65th Cong., 1st Sess., pp. 3–6.[7] The only statutory condition for the exercise of the Commission's powers under Section 1(15) is the existence of an emergency in the "opinion" of "the Commission" (*Iversen* v. *United States,* 63 F. Supp. 1001, 1003 (D. D.C.), affirmed *per curiam,* 327 U.S. 767). In the present case, the Commission set forth its findings in the service order with respect to "an acute shortage of box cars", the existence in its opinion of an emergency requiring immediate action in all parts of the country, and the impracticability and detriment to the public interest of

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Investigation of Adequacy of Railroad Freight Car Ownership, and *Ex Parte* No. 252, *Incentive Per Diem Charges,* now being heard by examiners of the Commission.

[7] The author of the car-service bill stated (55 Cong. Rec. 2020):

> Mr. ESCH: * * *
>
> The matter of car shortage is not of recent development. It has been with us for many years. It is an evil that is seasonal for the most part, occurring in those periods of the year when the shipments of coal and grain are greatest. The car shortage that has been existing ever since March of last year, which has been continuous in fact for a year, may in large degree be attributed to war conditions. While this bill seeks to give added powers to the commission in cases of emergency, it is not merely the emergency of war but the emergency of economic conditions.

notice and public procedure. The court was not entitled to substitute its judgment on these points for that of the Commission. *Avent* v. *United States*, 266 U.S. 127; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286; *Daugherty Lumber Co.* v. *United States, supra*, 141 F. Supp. at 581.

Petitioner also argues that the Commission can issue only "directions" under its emergency powers, which it interprets to mean an action which will resolve only a very limited local problem, akin to a traffic jam, and that it cannot issue an order applicable to all railroads in all parts of the country (Pet. 12–13). But the statute provides expressly that the Commission has authority "to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission," and also "to make such just and reasonable directions with respect to car services * * * as in its opinion will best promote the service in the interest of the public and the commerce of the people * * *" (49 U.S.C. 1(15)). If the Commission may thus suspend *all* rules and regulations respecting car service, surely it may issue directions to accomplish whatever is necessary to relieve the situation. There is nothing in the wording of the statute, nor do we find anything in the legislative history,[8] which would prevent the Commission from

[8] Whatever limitations the Commission may originally have conceived upon the powers which it should be given to deal with car-service problems (See Pet. 13), the fact is that the summary power actually given the Commission to deal with such problems is not, and was not intended to be, restricted to circumscribed, localized difficulties.

dealing with any facet of car service or applying its orders to all railroads in all parts of the country as it found necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
BAREFOOT SANDERS,
Assistant Attorney General.
KATHRYN H. BALDWIN,
Attorney.

APRIL 1967.

APPENDIX

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*, provides in part as follows:

49 U.S.C. 1(15):

(15) *Powers of Commission in case of emergency.*

Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission: (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks

for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

49 U.S.C. 17(9):

(9) *Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.*

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Title 28 of the United States Code provides in pertinent part as follows:

SEC. 2321:

Procedure generally; process.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

SEC. 2322:

United States as party.

All actions specified in section 2321 of this title shall be brought by or against the United States.

SEC. 2323:

Duties of Attorney General; intervenors.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sec-

tions may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

SEC. 2324:

Stay of Commission's order.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

SEC. 2325:

Injunction; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

U.S. GOVERNMENT PRINTING OFFICE: 1967